



A Blueprint for Conducting a Fair, Legal, Comprehensive Internal Civil Rights Investigation

By Joseph Vincent

Internal civil rights investigations have become an important tool for higher education institutions as they work to align culture and practice with the values embodied in federal civil rights laws. Obviously, in a perfect world, investigations would be obsolete. In that ideal universe, employees and students would espouse cultural proficiency naturally and easily. Diversity in recruitment, hiring and advancement and gender equality in pay and programming would simply exist without prompting or intervention. However, a quick scan of the past 10 years of federal court action related to civil rights in education and employment demonstrates that there is still significant work to be done.

Making the idea a reality — or at least moving toward that reality — requires a concerted, systematic approach. It also requires internal cultural alignment and adoption of certain values. Too often, the protection of civil rights is an add-on to other initiatives — an afterthought. Until systems and institutional cultures prioritize protection of civil rights as an effective and natural part of their organizational processes, inequity and the resultant conflicts will continue to exist. Accordingly, the people on the front lines of this particular brand of dispute resolution, often in human resources and student affairs departments, must be recruited, equipped and trained to conduct legally sound, fair and comprehensive investigations.

A good investigator conducting a proper civil rights investigation protects the organization from legal liability. Title VII investigators, mostly in HR departments, have been conducting these types of investigations for decades as a way to show their organization's commitment to protecting their employees' civil rights. Title IX-based investigatory practices are built on the foundation laid by Title VII laws, regulations and case law. Thus, the rise of Title IX litigation related to sex-based discrimination in higher education has provided a new opportunity to assess and reflect on institutional approaches to these investigatory practices.

Some recent highly publicized court cases have exposed significant shortcomings in the very same systems and cultures that were designed to support and respect individual civil rights. These cases have demonstrated how a failure to conduct an appropriate civil rights investigation — a crucial stopgap in the nondiscrimination era — can exacerbate and magnify the effect of unwanted behavior to the detriment of the institution and its community. When schools lose cases at the federal court level, it's largely due to a failure to resolve allegations internally in a manner consistent with industry standards.

While civil rights investigations are complex, often the internal mistakes are basic ones. While investigations require particular skills and training, they also follow simple guidelines. When we observe the damage to the health and reputation of academic institutions during high-profile discrimination cases, the sheer scope of the scandal may cause us to overlook an initial failure to follow the simple, well-established guidelines for internal investigation and resolution.

Commitment of Institutional Leadership

Successful civil rights investigations require the commitment of institutional leadership to grant investigators the authority and autonomy necessary to perform their role. Civil rights investigators need authority to make decisions, sometimes in a very short time frame, with the confidence that their leadership supports them. That means if an employee's work schedule needs to change to comply with a "no-contact" order, the investigator needs the institutional authority to make it happen. The same is true for changing a student's class schedule or adjusting the time or date of an exam. Without delegated authority and endorsement from the institution's leadership, supervisors and faculty may resist cooperation with an investigator and become more of an obstacle than an ally. If faculty and staff know that ultimately administration is committed to eliminating discrimination, they're more likely to engage in the dialogue and investigation process in good faith, thus aiding the process as a whole.

Institutional leadership must also commit to staying out of the way. This is a difficult thing to ask, considering these administrators have built their careers on successful leadership skills and strategic problem solving. Yet, impartiality is critical to a good investigation; therefore, officials with a higher stake in the reputational and operational health and growth of the institution have a harder time appearing impartial. For instance, the institution's general counsel should not conduct or oversee civil rights investigations. As a "zealous advocate" defending the institution from legal liability, general counsel may struggle to conduct a neutral, fact-finding civil rights investigation without the appearance of bias.

Have a Policy, Know Your Policy, Follow Your Policy

A robust nondiscrimination policy should outline the personnel handling institutional reports and the progression of steps the institution will take to achieve resolution. The policy should also establish the institution's commitment to stop, prevent and remedy a discriminatory environment. For civil rights investigators, the policy should provide a simple but effective rubric administrators and investigators can use to vet the appropriateness of the institution's response. It should compel important questions: Is the current approach stopping the discrimination from continuing, and preventing it from happening again? What actions are necessary to repair or

remedy the situation created by the current circumstances? When investigators test institutional actions against these questions, they are on the road to ensuring an appropriate investigation and resolution.

By law, investigations are required to be prompt, thorough and impartial. An institution's nondiscrimination procedures should outline the major phases of an investigation with these goals in mind. Further, investigators and administrators must commit to faithfully observe each phase. Federal cases that fail at the motion to dismiss or motion for summary judgement phase — thus exposing the institution to liability and forcing settlements to avoid lengthy litigation — often begin with the simple failure to follow the institution's own procedures.

By learning and understanding the guidelines, seemingly complex civil rights investigations become methodical, intentional and just.

Historically, judges have granted institutions a wide berth regarding the internal resolution of discrimination complaints. These days, however, judges are increasingly more willing to intervene when an institution's procedures are inconsistent with industry standards. Still, there remains some deference when an institution's procedures comply with federal law. When the institution materially follows those procedures, the risk of an interventionist judicial decision is much lower. In many cases, the court will defer to the institution's findings if the proper procedures are followed, even if there is another reasonable outcome (i.e., the institution found the responding party "not responsible," but the facts of the case could also support a finding of responsibility).

Bottom line: Investigators not only need procedures that are legally compliant and consistent with industry standards, but also must be knowledgeable regarding those procedures and must materially comply with them throughout the process.

Prompt, Thorough, Impartial

Civil rights investigations must be prompt, thorough and impartial. To be considered "prompt," an institution's procedures should specify the initial response time to an allegation, outline when and under what circumstances an investigation will begin, and provide a timeline for the major stages of an investigation, including a conclusion, opportunity for appeal if applicable and final resolution. The procedures should also provide for exceptions to the timelines and specify how exceptions will be assessed and communicated to all parties.

A thorough investigation begins with a methodical approach. Ideally, this approach is described in the institution's procedures. Both the individual reporting the discriminatory circumstances and the individual(s) implicated by the allegations should have the chance to make statements to investigators relating to the claims brought. They should also get the chance to identify others whose perspective or information could help bolster or refute the claims. At the end of the investigation, the institution should provide the parties with a documented assessment of the facts, evidence and conclusion. This type of progression typifies a thorough investigation. While it can be time consuming, it is not a complex approach, and yet it greatly enhances the fairness of the process. Skipping any of these steps, like disciplining an employee or student without telling them why or using statements from witnesses to drive an investigatory conclusion but not giving the opposite party an opportunity to review and respond to those statements, cripples the integrity of the investigation and opens the door to potentially catastrophic legal liability.

An impartial investigation avoids any indication of bias on the part of the investigators or final decision makers. As mentioned before, institutional leaders or other administrators must avoid weighing in or intervening in the course of an investigation. Investigators are expected to be neutral — favoring neither side, but instead seeking only to discover the truth. Ensuring the process is fairly designed and provides equal opportunities to receive and review information removes potential bias. Allegations of bias also threaten the investigation's integrity when investigators meet with one or both parties without notice to the other party or notes from the meetings. When

sidebar or outside meetings between investigators and a party to the complaint come to light, accusations of bias soon follow.

Notify and Share

In addition to procedural noncompliance, investigations suffer just as often from due process violations. While the term is applied differently in an institutional setting than it is in a court, and differently again depending on whether the institution in question is public or private, the basic requirements of due process are notice of the charges/allegations and an opportunity to comment. When the proceeding is an institutional civil rights investigation, both parties (the reporting party and the respondent) have a right to know certain elementary but critical information, such as who made the complaint, who is the accused, what are they accused of, what evidence is provided to support and oppose the accusation, and the identity and content of witness testimony supporting and opposing the accusation.

In a civil rights investigation, investigators bear the burden, as outlined in the institution's policies, of notifying all parties at all major stages of an investigation. These stages include the opening of an investigation, a statement of alleged policy violations, an outline of the investigation before it unfolds, and when an investigation has concluded. This also includes updating the parties on delays or extensions to any part of the planned investigation timeline and outlining appeals procedures and deadlines.

The notification burden also includes communicating when evidence or testimony is collected and sharing that information with both parties for review and comment. So, for example, if a witness testifies to the truth of allegations against an individual, that witness testimony should be provided to both parties for review. The accused then has the opportunity to point out flaws in the evidence gathered — be it flaws in the actual information provided by the witness, counterevidence, or additional information which calls the credibility of the witness into question.

Following these simple steps helps preserve the integrity of the investigation. Failing to properly notify parties or provide ample time to review and comment on the allegations, evidence and testimony puts the investigation in jeopardy and the institution at risk.

Training, Consultation and Resources

Civil rights investigations are often complex and difficult. They typically consume time and resources, often where

there are not much of either to spare. The vast majority of higher education institutions are conducting these investigations internally using existing staff. With the right training, these employees can successfully conduct investigations.

A benefit of heightened awareness due to the rise in Title IX litigation is that the quantity and quality of training and even certification for civil rights investigators and nondiscrimination program administrators has grown significantly. Peter Lake, J.D., of Stetson University, a prolific teacher and trainer, has created a wealth of online training resources. Mainstay law firms like Fisher Phillips offer email, newsletter and webinar-based guidance for civil rights policy and resolution of discrimination. Finally, specialized law firms like The NCHERM Group offer tailored consulting as well as online and in-person training and certification courses in civil rights investigations, program coordination, prevention and awareness, policy development and other related fields. These are but a few of the resources available to investigators and institutions. The bottom line is that investigations can be done well by properly trained investigators, and properly trained investigators have more resources at their disposal now than at any other time in the past. In addition to training and consultation, professional membership associations, workgroups and listservs (such as the Association for Title IX Administrators (ATIXA) and CUPA-HR) provide an endless stream of thoughtful, up-to-date advice from investigators in the field.

Follow the Blueprint

On the whole, higher education institutions are improving in addressing and resolving discriminatory circumstances on their campuses and in their programs. For every case that makes it into federal court, there are literally hundreds, if not thousands, that are successfully and fully resolved internally. What we see in the courts is usually big, messy and shocking; however, the reality is that these cases often result in litigation due to institutions' neglect of some of the fundamental tenets of civil rights investigations. By learning and understanding the guideposts, complex investigations become methodical, intentional and just. And our campus communities deserve nothing less. 

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